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IN THE

Supreme Court of the United States

October Term, 1967

NO. 472

B. A. WATSON, *Petitioner*

v.

GULF STEVEDORE CORPORATION, *Respondent*

RESPONDENT'S REPLY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

This Petition for Writ of Certiorari, though disarmingly simple on its facts, can have incalculable repercussions on the relevant law if Petitioner's position prevails. In effect, it is a concerted effort by the Petitioner-longshoreman to reshape the law so as to eliminate the basic quid pro quo of compensation law as well as the exclusiveness of liability provisions of the Longshoremen's & Harbor Workers' Compensation Act[1] by permitting an action for

1. Longshoremen's & Harbor Workers' Compensation Act, 33 U.S. C.A., Sec. 905.

personal injuries direct against the Stevedore-employer by the employee. The intent is to directly expose an independent shoreside contracting stevedore which has no connection whatsoever with the vessel to a potential suit for unlimited damages for personal injuries whenever Petitioner-longshoreman independently decides short of instituting legal action against the vessel that the shipowner would be cast in liability, if sued, and further concludes that the shipowner would thereafter succeed in its indemnity action against the stevedore. The Respondent, Gulf Stevedore Corporation, respectfully submits that such a theory in law as against a shoreside independent contracting stevedore is a nullity, that the opinions of the Trial Court and Court of Appeals below were eminently correct and the Petition for Writ of Certiorari should be denied.

I.

STATEMENT OF THE CASE

These are the material facts. Following an accident to longshoreman B. A. Watson on February 6, 1957, on board the SS SAN DIMITRIS in Houston, Texas a libel was filed on behalf of Watson in the United States District Court for the Southern District of Texas, Houston Division, on August 1, 1963, some six years after the incident occurred. This libel was filed *in personam* directly against the injured longshoreman's employer, Gulf Stevedore Corporation. In a highly unique series of allegations it was alleged that Respondent, Gulf Stevedore Corporation, warranted to the owners and operators of the SS SAN DIMITRIS that it would perform its stevedoring services in a workmanlike manner which it failed to do; that as

a consequence such failure brought into play the negligence of the vessel owners and/or the unseaworthiness of the SS SAN DIMITRIS, all of which contributed to Petitioner's injuries for which the vessel was liable; that the circumstances of the accident to B. A. Watson supported an action for indemnity by the shipowner against the Respondent-stevedore and that Petitioner-longshoreman as a beneficiary of such stevedore contract and as equitable owner of the shipowner's right to indemnity therefore was able to bring suit directly against his employer, Gulf Stevedore Corporation. In conclusion, Petitioner urged that the then recent decision of the United States Supreme Court, *Reed v. Steamship YAKA*,[2] opened up this new avenue of recovery direct against the employer-stevedore and that Sec. 905 of the Longshoremen's & Harbor Workers' Compensation Act[3] pertaining to the exclusiveness of liability of the employer no longer retained any vitality in this factual context.

Respondent-stevedore's Motion for Summary Judgment and/or Dismissal was filed on August 28, 1964, to which was attached an affidavit of Joseph M. Raspino, Assistant Secretary and Treasurer and an officer of Gulf Stevedore Corporation which affirmed that Respondent had no ownership or operational interest in the SS SAN DIMITRIS or any other vessel at any time and was solely an independent contracting stevedore; that the oral contract to load cargo on the date of the accident was with Luria Bros., the owners of the cargo and a time or space charterer of the SS SAN DIMITRIS, and not with the vessel owners. These mat-

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2. Reed v. Steamship *YAKA*, 373 U.S. 410, 10 L. Ed. 2d 448 (1963).

3. Title 33 U.S.C.A., Sec. 905.

ters are uncontested. Additionally, the Motion for Summary Judgment and/or Dismissal urged the applicability of Section 5 of the Longshoremen's & Harbor Workers' Compensation Act, denied the application on these facts of *Reed v. Steamship YAKA*,[4] as well as the theory of legal indemnity under *Ryan Stevedoring Company v. Pan Atlantic Steamship Corporation.*[5] In conclusion, Respondent urged that Petitioner had fashioned a non-existent theory of liability in order to circumvent the prosecution of a third-party action against the vessel and/or its owners or operators by violating a specific statutory prohibition against suing one's employer[6] when such accidents were clearly covered by the Longshoremen's and Harbor Workers' Compensation Act.

II.

OPINIONS BELOW

The Trial Court had no difficulty in immediately perceiving the true significance of this suit and granted Respondent's Motion to Dismiss. The District Court's opinion is found in 257 F. Supp. 503 (S.D. Tex. 1965) and is set forth in Appendix A. Following Petitioner's appeal to the United States Court of Appeals for the Fifth Circuit, that Court also realized that to permit a longshoreman to pierce the exclusiveness of liability provisions of the Longshoremen's & Harbor Workers' Com-

4. Reed v. Steamship *YAKA*, 373 U.S. 410, 10 L. Ed. 2d 448 (1963).

5. Ryan Stevedoring Company v. Pan Atlantic Steamship Corporation, 350 U.S. 124, 100 L. Ed. 133 (1956).

6. Title 33 U.S.C.A., Sec. 905.

pensation Act[7] under these facts would result in the complete destruction of the purpose of this Act as well as that of compensation acts in general. The Circuit Court opinion affirming the Trial Court is reported in 374 F.2d 946 (5th Cir. 1966) and is set forth in Appendix B. The denial of Petitioner for Petition Rehearing is unreported to date, and is set forth in Appendix C.

III.

QUESTION PRESENTED

The question which emerges and which the lower courts have properly decided adversely to Petitioner is this:

> CAN A LONGSHOREMAN-EMPLOYEE BRING SUIT FOR UNLIMITED DAMAGES *IN PERSONAM* AGAINST HIS EMPLOYER, AN INDEPENDENT CONTRACTING STEVEDORE, DESPITE THE EXCLUSIVENESS OF LIABILITY PROVISONS OF THE LONGSHOREMEN'S & HARBOR WORKERS' COMPENSATION ACT (TITLE 33 U.S.C.A., SEC. 905).

We respectfully submit that the answer is no, that both the District Court and the Circuit Court were correct in dismissing the suit as lacking a valid basis in law and that the Petition for Writ of Certiorari should therefore be denied.

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7. Title 33 U.S.C.A., Sec. 905.

IV.

ARGUMENT AND AUTHORITIES IN OPPOSITION TO PETITIONER'S EFFORTS TO PROSECUTE A LONGSHOREMAN-EMPLOYEE'S SUIT FOR UNLIMITED DAMAGES AGAINST HIS EMPLOYER, AN INDEPENDENT CONTRACTING STEVEDORE, DESPITE THE EXCLUSIVENESS OF LIABILITY PROVISIONS OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATON ACT (U.S.C.A. 33, SEC. 905).

A.

Preliminary Assumptions of Fact By Petitioner In Order To Justify A Suit Directly Against the Employer-Stevedore

In both the Trial and Appellate Courts, Petitioner has urged that this suit is a novel theory of first impression. Rather than permit any impression to remain that such a theory is meritorious and supported by sound legal principles, Respondent has consistently felt obligated before the Courts to analyze each element of Petitioner's thesis in order to insure that there can be no question as to what is being attempted and why it is unsound in law. Despite the somewhat obscure and commingled bases of legal recovery urged by Petitioner in this case, certain features stand out. In order to reach the desired result, Petitioner must assume a number of matters which have not been proved, much less alleged in a suit against the vessel, as well as assume matters which are unsupportable in law short of prosecuting any legal action against the shipowners or the SS SAN DIMITRIS. It has first been factually assumed:

(1) The vessel is unseaworthy and its owners are cast in liability.

(2) The owners of the alleged unseaworthy vessel who are not a party to this suit are entitled to indemnity over against the Respondent-stevedore which breached its warranty of workmanlike service to the shipowner.

With Petitioner's legal hypothesis commencing by resting on these unproved assumptions, the liability issues of the potential third party suit against the SS DIMITRIS are resolved without the vessel or its owners ever being sued and before any facts are proved.

Having independently affixed vessel liability and permitted indemnity over, Petitioner then assumes further matters in law in fashioning this singular legal theory on which to base a suit direct against the stevedore-employer. Yet, even if Petitioner is given the benefit of the doubt as to fact issue 1 and as to fact issue 2, (which is, at best, precarious in the Fifth Circuit in view of *Waterman Steamship Corporation v. David*,[8] on ship conduct which precludes indemnity) the following assumptions in law by Petitioner are wholly unsupportable:

(3) Petitioner occupies the same position as a vessel and is thus a third-party beneficiary of a contract between the space charterer and Respondent-stevedore.

(4) Petitioner is an equitable owner and beneficiary of the shipowner's claim for indemnity over against the stevedore.

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8. Waterman Steamship Corporation v. David, 353 F. 2d 660 (5th Cir., 1965).

(5) Having achieved the legal status described in 3 and 4, *supra*, the exclusiveness of liability provisions of the Longshoremen's & Harbor Workers' Compensation Act[9] have no applicability to Petitioner, and *Reed v. Steamship YAKA*[10] is supporting authority.

Inasmuch as the questions before this Honorable Court are purely ones of law, it is the legal principles which require examination and not particular facts. Whether or not a longshoreman sustained merely a cut finger or received fatal injuries as a result of an accident should have no bearing on a determination of what is a valid legal theory on which to predicate an action for damages, whether against a third party or otherwise. We therefore direct our attention to legal theories (3), (4) and (5), *supra*, in that order.

B.

The Contention That Petitioner Is A Third Party Beneficiary of the Stevedore Contract

It is undisputed that the stevedore contract in this case was not between the Respondent, Gulf Stevedore Corporation, and the vessel owner. On the contrary, the contract was between the Respondent and Luria Brothers as space charterer of the vessel. However, it is not contended by Respondent that the question of law before this Honorable Court is significantly altered by such circumstances. Indeed, the law is clear that the

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9. Title 33 U.S.C.A., Sec. 905.

10. Reed v. Steamship *YAKA*, 373 U.S. 410, 10 L. Ed. 2d 448 (1963).

vessel owner is a third-party beneficiary when the stevedore contracts for its services with the charterer, *Crumady v. The JOACHIM HENDRIK FISSER*,[11] and that the vessel owner is also a third party beneficiary when the stevedore contracts for its services with the consignee of the cargo. *Waterman Steamship Corporation v. Dugan & McNamara, Inc.*[12]

Contrary to Petitioner's contention that he is a beneficiary of the agreement to load cargo between the stevedore and the space charterer, he is nothing of the sort. The *Waterman* case[13] refers to services performed for the benefit of the vessel owners who have the non-delegable duty to furnish a seaworthy ship. Petitioner occupies no such status. The third-party beneficiary theory in maritime indemnity cases comes into play when the vessel has been rendered unseaworthy or otherwise liable to a party such as Petitioner and the shipowner is in turn seeking indemnity as a consequence of a breach of warranty of workmanlike service by the stevedore. At this point the body of indemnity law commencing with *Ryan Stevedoring Company v. Pan Atlantic Steamship Corporation*,[14] is activated. Yet, in the present case no vessel liability has been imposed; in fact, no suit against the vessel has ever been filed or attempted since the accident to B. A. Watson in 1957. The full significance of

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11. Crumady v. The JOACHIM HENDRIK FISSER, 358 U.S. 423, 3 L. Ed. 2d 413 (1959).

12. Waterman Steamship Corporation v. Dugan & McNamara, Inc., 364 U.S. 421, 5 L. Ed. 2d 169 (1960).

13. Id.

14. Ryan Stevedoring Company v. Pan Atlantic Steamship Corporation, 350 U.S. 124, 100 L. Ed. 133 (1956).

the third-party beneficiary theory on maritime indemnity law is seen in *Waterman Steamship Corporation v. Dugan & McNamara, Inc.*, in which it is made only too clear that the warranty which the stevedore owes when he goes aboard a vessel to perform services is plainly for the benefit of the vessel.[15] The importance of the intentions of the contracting parties cannot be over emphasized, and whatever limits the zone of modern law recognizes in third-party beneficiary situations, the intent that the vessel owner or one occupying a similar status benefit is apparent from the language of *Waterman.* Similarly, *Ferrigno v. Ocean Transport, Ltd.*,[16] held that even the shipowner had a heavier burden to sustain that it was intended to be a third-party beneficiary in a case in which the stevedore had executed a written contract with a charterer's agent containing a disputed hold harmless clause. See also *Sanderlin v. Old Dominion Stevedoring Corporation*,[17] wherein the application of the third party beneficiary theory was rejected in a somewhat different factual context.

In the present case, Petitioner additionally finds himself standing in line behind the shipowner in contending

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15. Waterman Steamship Corporation v. Dugan & McNamara, Inc. 364 U.S. 421, 5 L. Ed. 2d 169 (1960), wherein the following appears:

> ". . . The *warranty which a stevedore owes when he goes aboard a vessel to perform services is plainly for the benefit of the vessel* whether the vessel owners are parties to the contract or not. That is enough to bring the vessel into the zone of modern law that recognizes third party beneficiaries. Restatement, Law of Contracts, Section 133." (Emphasis supplied.)

16. Ferrigno v. Ocean Transport, Ltd., 309 F.2d 445 (2d Cir., 1962).

17. Sonderlin v. Old Dominion Stevedoring Corporation, 261 F. Supp. 281 (E.D. Va. 1966).

for third-party beneficiary status, since Luria Bros., the charterer, had contracted with the Respondent-stevedore for stevedore services. Petitioner actually seeks for himself a cause of action which has not matured into reality, since the vessel owner has never acquired such a claim, not having been sued, served or cast in liability. Whether bottomed on general principles of contract law as contained in the Restatement, Law of Contracts, Sec. 133,[18] the spirit of *Crumady*[19] or that of *Waterman*[20] with its built-in common sense approach as to who is to benefit, it strains reality to conclude that the maritime stevedore employer which is legally obligated anyway to respond for weekly compensation payments for injuries, death benefits and attendant medical expenditures under the Longshoremen's & Harbor Workers' Compensation Act when injuries to longshoremen occur would cut away the very bedrock on which the Act rests by contracting as Petitioner suggests.

C.

The Contention That Petitioner Is An Equitable Owner And Beneficiary of the Shipowner's Claim To Indemnity

Indemnity in law will not arise until the party to be indemnified sustains a loss. In this instance, this could occur only if fact issue 1 were resolved favorably to Petitioner so that basic vessel liability was imposed for unseaworthiness. Such liability cannot be imposed unless

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18. Restatement, Law of Contracts, Sec. 133.

19. Crumady v. The JOACHIM HENDRIK FISSER, 358 U.S. 423, 3 L. Ed. 2d 413 (1959).

20. Waterman Steamship Corporation v. Dugan & McNamara, Inc., 364 U.S. 421, 5 L. Ed. 2d 160 (1960).

the sole warrantor of a seaworthy ship (the vessel owners or the ship itself) is sued. No suit has been brought against the vessel or its owners, so no ship liability can be imposed. Without ship liability there can be no loss, and without a loss the vessel and its owners have no legal basis or reason to assert indemnity. Thus, the first point to be made is that this is not a case for consideration of indemnity or indemnity cases.

The additional position that Petitioner is an equitable owner and beneficiary of a shipowner's claim to indemnity is equally without merit when it is considered that, unless one indulges in Petitioner's dual factual assumptions in 1 and 2 above, it is presumptive to assume automatically that basic vessel liability exists or that it is necessarily a fact situation for indemnity. Again, if it is assumed that fact issues 1 and 2 favor Petitioner's position, Petitioner's cause of action for unseaworthiness still must be urged against the ship or the sole warrantor of the seaworthy vessel, the vessel owners. Petitioner has no ownership or interest, equitable or otherwise, in the vessel owner's claim for indemnity against the stevedore which only comes into being after the vessel owner is sued and liability affixed. Such an indemnity claim itself consists primarily of the loss suffered by the vessel owners as a result of the ship's unseaworthiness for which payment has or is being made to the injured party. Having thus been paid once by the vessel owners, an injured party cannot have any interest in the vessel owners' claim against the stevedore in order to recoup its very loss for such payment.

Petitioner's position that he should be entitled to prosecute the claim directly as the equitable owner of the vessel owner's claim encounters multiple hurdles including the question of whether or not there can be a viable claim

for indemnity by a vessel owner in which Petitioner can ever acquire any interest. Apart from other previously discussed problems, Petitioner's argument requires that he summarily sidestep any application of the exclusiveness of liability provisions of the Longshoremen's & Harbor Workers' Compensation Act.[21] We direct our attention to this Section of the Act.

D.

The Contention That Petitioner's Legas Status Renders Inapplicable Title 33 U.S.C.A., Sec. 905 of the Longshoremen's & Harbor Workers' Compensation Act

It would be folly to ignore the possible consequences of Petitioner's position if it ever becomes the law. Petitioner moves unhesitatingly to engraft onto the rationale of this case the opinion of *Reed v. Steamship YAKA*.[22] In doing so, it is hoped that once again the same exclusiveness of liability provisions of the Longshoremen's & Harbor Workers' Compensation Act can be avoided, even though Respondent-stevedore in this instance has not the remotest connection with the ownership and operation of the vessel.

The short answer to Petitioner's efforts to employ the thrust of *YAKA* is that it has no application to this case. *Reed v. Steamship YAKA* was concerned with injuries to a longshoreman employed by a stevedore who was also the bareboat charterer of the vessel. As charterer or owner *pro hac vice* the employer was obligated to assume the legal warranty of seaworthiness owed to longshoremen working on ships in accordance with *Seas Shipping Co. v.*

21. Title 33 U.S.C.A., Sec. 905.

22. Reed v. Steamship *YAKA*, 373 U.S. 410, 10 L. Ed. 2d 448 (1963).

Sieracki.[23] Yet as employer the stevedore presumably was also accorded the exclusiveness of liability provisions contained in the Longshoremen's & Harbor Workers' Compensation Act.[24] An *in rem* action in admiralty was filed against the vessel on the theory of unseaworthiness, and the United States Supreme Court held that the suit supported *in personam* liability, since the employer-stevedore-shipowner *pro hac vice* owed the warranty of seaworthiness to the longshoreman, despite the provisions of 33 U.S.C.A., Sec. 905.

Permeating the rationale of Petitioner in this case is the *YAKA* thesis; yet, there is no similarity between that case and the present one. As the affidavit of Joseph M. Raspino, an officer of Gulf Stevedore Corporation, reflects, Respondent-stevedore has no interest whatsoever in the ownership, operation and control of the ship. Gulf Stevedore Corporation is a local business enterprise in Houston, Texas whose sole contact with this vessel was a result of its oral agreement with Luria Brothers, owners of cargo and a time or space charterer, to load its cargo on board. Petitioner would strain the *YAKA* reasoning even further and suggest that the Court ignore Sec. 905 of the Longshoremen's & Harbor Workers' Compensation Act and impose liability in a direct action *in personam*, even when the Respondent-stevedore is in no way connected with the vessel as in this case.

By urging *YAKA* upon the Court, Petitioner seemingly contradicts his previously asserted position that the cause of action which he is stressing is solely as a beneficiary

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23. Seas Shipping Co. v. Sieracki, 328 U.S. 85, 90 L. Ed. 1099 (1946).

24. Title 33 U.S.C.A., Sec. 905.

25. Title 33 U.S.C.A., Sec. 905.

of the stevedore's breach of its implied warranties running to the shipowner and as an equitable owner of the vessel owner's right of indemnity against the stevedore. *YAKA* was a direct action *in rem* based on the unseaworthiness of the vessel. Gulf Stevedore Corporation as a land based business operation does not owe the warranty of seaworthiness to anyone.

V.

CONCLUSION

Petitioner would not deny that in this case he has sought to go further than he would normally need to go in order to maintain suit. Yet in doing so, he has departed from sound legal doctrines which, if successful, could destroy the very premise on which all compensation law is based, a *quid pro quo* between employee and employer.

Gulf Stevedore Corporation owns and operates no vessels, but it does employ longshoremen, all of whom are covered by a policy of Workmen's Compensation Insurance pursuant to the provisions of the Longshoremen's & Harbor Workers' Compensation Act which was in full force and effect on the date of injury to B. A. Watson. Section 5 of the Act provides that compensation is the exclusive liability of the employer (Gulf Stevedore Corporation) to its own employees (Petitioner Watson) when it has secured payment of compensation as required by the Act. This was done. Petitioner's clear departure from the legal issues in this case to allude to the compensation claim is presumably contemplated to cast the challenged theories in a more advantageous light, despite the fact that Respondent has fairly met its statutory obligations under the Act, and, indeed, exceeded them. Yet the controlling question in the case remains unobscured. If there

can be no reliance placed on the vitality of Section 905 of the Longshoremen's & Harbor Worker' Compensation Act under these facts, the result summarily negates any protection which the employer has under this Compensation Act with respect to an *in personam* action by a longshoreman-employee.

Inasmuch as there is no conflict with the decision of another Court of Appeals or with Federal Law or with applicable decisions of this Court, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

CARL O. BUE, JR.
Attorney for Respondent,
Gulf Stevedore Corporation

Of Counsel:

ROYSTON, RAYZOR & COOK
877 San Jacinto Building
Houston, Texas 77002

PROOF OF SERVICE

I, Carl O Bue, Jr., attorney for Respondent being a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I have served copies of the foregoing Reply in Opposition to the Petition for a Writ of Certiorari upon Mr. W. Jiles Roberts, Counsel for Petitioner, by mailing three copies thereof postage pre-paid, addressed to his office in the Americana Building, Houston, Texas, 77002, dated this 6th day of October, 1967.

CARL O. BUE, JR.

APPENDIX A

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

BERTRAM A. WATSON,

Libellant

v.

GULF STEVEDORE CORPORATION,

Respondent

A.D. NO. 63-H-101

W. JILES ROBERTS of Houston, Texas;
Proctor for Libellant.

ROYSTON, RAYZOR & COOK, (CARL O. BUE, JR.)
of Houston, Texas; Proctor for Respondent.

December 28, 1965

Memorandum and Order of Dismissal:

Petitioner longshoreman, while in the employment of the Respondent stevedoring company, was injured while working aboard the SS SAN DIMITRIS in February of 1957 in the Port of Houston, Texas.

Petitioner purports to sue its own employer directly on the theory that he is the third-party beneficiary of an implied warranty by Respondent to the vessel owners that it would perform its stevedoring duties in a workmanlike manner with its failure to do so rendering the vessel unseaworthy. This suit is brought notwithstanding the exclusive liability provision as against an employer in the Longshoremen's and Harbor Workers' Compensation Act, Section 905 of Title 33, USCA, which it is not disputed is otherwise applicable.

Petitioner relies upon the doctrine in *Reed v. The Yaka*, 373 U.S. 410, and upon an extension of the principle that a vessel owner has a right of indemnity as against a stevedoring contractor for its breach of warranty. *Ryan Co. v. Pan-Atlantic Corporation*, 350 U.S. 124 and *Waterman Steamship Corporation v. Dugan and McNamara, Inc.*, 364 U.S. 421. See also *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315. But no authorities are cited nor can any be found that extend either proposition to the length sought here. This case involves no prior adjudication of the vessel's liability for unseaworthiness.

The Yaka clothes a longshoreman *injured aboard a particular vessel* (emphasis added throughout) with the status of a "seaman" insofar as his *right to sue the vessel* for unseaworthiness is concerned notwithstanding the exclusive remedy provision of Section 905. In respect to instant case, it is only incidental that in *The Yaka* the longshoreman's employer was also the owner of the vessel *pro hac vice*. The record shows that Respondent in instant case had no relationship with the vessel other than as contracting stevedore.

Petitioner's reliance on a third-party right of indemnity is equally untenable. It would directly contradict and frustrate the purpose of Section 905. This right of indemnity inures to the benefit of the innocent vessel owner where her unseaworthiness is caused by the employer's breach of warranty. It would be another thing to say that it negates the protection which the employer has under the compensation act in respect to an *in personam* action by a longshoreman.

For the foregoing reasons, the Respondent's Motion to Dismiss is granted.

It is hereby ORDERED, ADJUDGED and DECREED that this Libel is dismissed with prejudice and Libellant to pay costs.

The Clerk will notify proctors.

/s/ ALLEN B. HANNAY
United States District Judge

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23579

BERTRAM A. WATSON,

Appellant,

v.

GULF STEVEDORE CORPORATION,

Appellee.

Appeal from the United States District Court for the Southern District of Texas

(March 28, 1967.)

Before HUTCHESON, GEWIN and COLEMAN, Circuit Judges.

HUTCHESON, Circuit Judge: The question presented is whether a libel for damages may be brought by a longshoreman-employee directly against the employer-stevedore despite the exclusiveness of liability provision of the Longshoremen's and Harbor Worker' Compensation Act.[1] The district court answered this question in the negative and

[1] 33 U.S.C. Sec. 905, which provides in pertinent part:
The liability of an employer [for compensation] shall be exclusive and in place of all other liability of such employer to the employee . . . and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . . .

accordingly granted a summary judgment in favor of the employer-stevedore.[2] We affirm.

The libellant Watson, a longshoreman, employed by appellee Gulf Stevedoring Corporation, was injured while handling cargo aboard the SS SAN DIMITRIS in Houston, Texas. It is important that the employer occupied solely the position of a shoreside stevedoring company having no ownership or operational interest in the vessel. The employer-stevedore's contract was with Luria Bros., a cargo owner and space charterer, rather than with the vessel owner. Libellant declares he was unable to bring the libel against the vessel or vessel owner because the vessel has changed ownership and names several times since the injury, and, in addition, has been broken up. Instead, he filed this libel against the employer-stevedore *in personam* on August 1, 1963, approximately six years after the accident happened on February 6, 1957.

The obstacle, which we hold to be insurmountable, in the path of this libel is 33 U.S.C. Sec. 905 which states in part that the liability of an employer for compensation "shall be exclusive and in place of all other liability of such employer to the employee . . . on account of such injury . . ." Although this section deprives employees of certain common-law rights and thus the chance to obtain large tort verdicts against their employers, it in turn grants them the quid pro quo of assured compensation. On the other hand, while the employers are required to pay compensation regardless of fault, their benefit is the certainty of limited liability.[3] But it is to be remembered that the employee's

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[2] 257 F. Supp. 503 (S.D. Tex. 1965).

[3] See Ryan Stevedoring Co., Inc. v. Pan-Atlantic Corp., 350 U.S. 124, 129, 140 (1956); Smither & Co., Inc. v. Coles, 242 F.2d 220, 222-23 (D.C. Cir.), cert. denied, 354 U.S. 914 (1957); Haynes v. Rederi A/S Aladdin, 362 F.2d 345, 350 (5th Cir. 1966).

right of recovery is limited by Sec. 905 only as against the employer; the employee remains free to sue nonemployer third parties for damages. See *Seas Shipping Co., Inc. v. Sieracki*, 328 U.S. 85, 101-102 (1946); 33 U.S.C. Sec. 933.

The theory of the libel before us is based upon settled principles. The vessel owner owes to the longshoreman the nondelegable obligation to maintain a seaworthy vessel; hence, the longshoreman may sue the vessel owner *in personam* or the vessel *in rem* for injuries caused by unseaworthiness. *Waterman Steamship Corp. v. Dugan & McNamara, Inc.*, 364 U.S. 421, 424 (1960); *Seas Shipping Co., Inc. v. Sieracki, supra.* Furthermore, the stevedoring company impliedly warrants that it will perform its stevedoring services in a workmanlike manner; thus the stevedore must indemnify the vessel owner for damages paid to the longshoreman when a breach of the warranty of workmanlike service brings into play the vessel's unseaworthiness.[4] Using those established principles as a platform, libellant urges two contentions on which he attempts to sue the employer-stevedore directly: first, that the longshoreman is a third-party beneficiary of the warranty of workmanlike service; second, that the longshoreman is the equitable owner of the vessel owner's claim for indemnity against the stevedore.

Both contentions assume the vessel's unseaworthiness which present law permits to be adjudicated only in an action against the vessel or its owner. To allow an adjudication of unseaworthiness in a libel by a longshoreman against the employer-stevedore plainly would destroy Sec.

[4] Italia Societa v. Oregon Stevedoring Co., Inc., 376 U.S. 315 (1964); Crumady v. The J. H. Fisser, 358 U.S. 423, 429 (1959); Ryan Stevedoring Co., Inc. v. Pan-Atlantic Corp., supra note 3, at 132; Waterman Steamship Corp. v. David, 353 F.2d 660, 661-62 (5th Cir.), cert. denied, 384 U.S. 972 (1966).

905. It is true that both the vessel and its owner are regarded as third-party beneficiaries of a stevedoring contract between the stevedore and someone other than the vessel owner, such as a charterer[5] or a consignee[6] of the cargo.[7] But there is no authority either that the longshoreman is similarly regarded[8] or that he is the equitable owner of the indemnification claim. Refusing to overlook the clear language of Sec. 905, we hold that this employee's sole and exclusive remedy, if any, is against the vessel owner.[9]

Reed v. The Yaka, 373 U.S. 410 (1963) clearly is distinguishable from the instant case. There the Court held that the employee could maintain a libel for damages against his employer because the employer also happened to be bareboat charterer, or owner *pro hac vice*, and as

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[5] Crumady v. The J. H. Fisser, supra note 4, at 428.

[6] Waterman Steamship Corp. v. Dugan & McNamara, Inc., 364 U.S. 421, 424-25 (1960).

[7] This is because "the warranty which a stevedore owes when he goes aboard a vessel to perform services is plainly for the benefit of the vessel whether the vessel's owners are parties to the contract or not." Crumady v. The J. H. Fisser, supra note 4, at 428. Thus nothing in this case turns upon the fact that the stevedore was engaged by the space charterer and cargo owner rather than by the vessel owner.

[8] See Ferrigno v. Ocean Transport Ltd., 309 F.2d 445 (2d Cir. 1962); Sanderlin v. Old Dominion Stevedoring Corp., 261 F. Supp. 281 (E.D. Va. 1966).

[9] Accord; Rodgers v. Baltimore & Ohio R.R., 323 F.2d 996 (2d Cir. 1963), cert. denied, 376 U.S. 932 (1964); Kyles v. James W. Elwell & Co., 296 F.2d 703, 706 (7th Cir. 1961), cert. denied, 369 U.S. 852 (1962); Thibodeaux v. J. Ray McDermott & Co., 276 F.2d 42 (5th Cir. 1960); Smither & Co., Inc. v. Coles, supra; Garland v. The S.S. Illiamna, 198 F. Supp. 187 (D. Alaska 1961); Skow v. Gypsum Carrier, Inc., 164 F. Supp. 879 (N. D. Cal. 1958).

such was liable for unseaworthiness.[10] Here, however, the stevedore, who had no operational interest in the vessel, was not charged with the obligation of seaworthiness.

We conclude that the district court was right in holding that this libel is precluded by Sec. 905. The judgment is

AFFIRMED.

[10] See also Grace Line, Inc. v. Kanton, 366 F.2d 510 (9th Cir. 1966) (per curiam); Miculka v. American Mail Line, Ltd., 229 F. Supp. 665 (D. Ore. 1964).

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23,579

BERTRAM A. WATSON

Appellant,

v.

GULF STEVEDORE CORPORATION

Appellee.

Appeal from the United States District Court for the Southern District of Texas.

(May 8, 1967)

On Petition for Rehearing

Before HUTCHESON, GEWIN and COLEMAN, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing in the above entitled and number cause be, and it is hereby DENIED.

APPENDIX D

§ 905. EXCLUSIVENESS OF LIABILITY

The liability of an employer precribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee. Mar. 4, 1927, c. 509, § 5, 44 Stat. 1426.